BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSHUA RYDALCH, Claimant, v. JAYCO, INC., Employer, and SENTRY CASUALTY CO., Surety, Defendants.	**IC 2017-003746** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** **Filed January 15, 2021**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Twin Falls, Idaho, on September 12, 2019. Patrick Brown of Twin Falls represented Claimant, and David Farney of Gardner Law Office represented Defendants.[1] The parties produced oral and documentary evidence at the hearing, took post-hearing depositions, and submitted briefs. The matter came under advisement on September 14, 2020.

[1] After the hearing but before briefing commenced Mr. Farney left Gardner Law Office and Michael McPeek substituted in as counsel for Defendants through the time this matter was submitted for final decision. As of the date of this writing Gardner Law Office no longer exists, but Mr. McPeek remains as counsel of record for Defendants.

ISSUES

The issues remaining for resolution are:

Whether and to what extent Claimant is entitled to the following benefits:

a. Medical care;
b. Disability based on medical factors, commonly known as Permanent Partial Impairment (PPI) benefits;
c. Permanent Partial Disability in excess of PPI (PPD); and
d. Attorney fees.[2]

CONTENTIONS OF THE PARTIES

Claimant suffered compensable injuries to his thoracic and lumbar spine as the result of an accepted accident which occurred on January 25, 2017. While Defendants paid for Claimant's initial medical treatment, they refused to pay for his continuing treatment beyond August 2017. Claimant is entitled to additional treatment. Further, while Defendants paid Claimant's PPI benefits at the rate of 7% whole person, he is entitled to PPI benefits at the rate of 8% whole person. Defendants wrongly refused to pay Claimant PPD benefits even though he suffered a permanent partial disability of 24% inclusive of PPI. Because Defendants wrongly denied Claimant reasonable and necessary medical benefits, they must pay attorney fees under Idaho Code § 72-804.

Defendants assert Claimant needed no further treatment after August 2017. His PPI rating is basically uncontested at 7% whole person and was timely paid. Claimant suffered no permanent disability in excess of his PPI rating. Attorney fees are not appropriate under the facts of this case because Claimant is entitled to no further benefits, and the rationale used by Claimant to support his claim is contrary to the law and long-standing precedent.

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[2] The parties at hearing also listed the issue of whether apportionment for a pre-existing condition under Idaho Code § 72-406 was appropriate, but Defendants made no argument in support of such theory. The issue is waived.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Surety representative Courtney Butler, taken at hearing;

2. Joint exhibits (JE) 1 through 21 admitted at or after hearing;[3]

3. The post-hearing deposition transcript of Anthony Sirucek, D.C., taken on November 14, 2019; and

4. The post-hearing deposition transcript of Tom Faciszewski, M.D., taken on December 23, 2019.

All pending objections preserved through post-hearing depositions are overruled.

FINDINGS OF FACT

1. Employer manufactures travel trailers. On January 25, 2017, Claimant was injured at work when a trailer frame which was held aloft by brackets at the front and rear became dislodged from the rear bracket and swung down, striking Claimant on the right side of his head. The impact knocked Claimant to the ground and he momentarily lost consciousness.

2. Immediately after the accident Claimant was taken to Occupational Health at St. Luke's Clinic in Twin Falls, where he was seen by Douglas Stagg, M.D. Claimant's primary initial complaint was pain in his left hip, thigh, and Achilles. He also had a headache and some mild left-sided discomfort in his low back. Dr. Stagg diagnosed Claimant with a right occipital scalp contusion and sprains to his left hip, thigh, and ankle.

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[3] Defendants conditionally objected to portions of JE 18 and 19 on foundational grounds, which objection was held in abeyance pending Dr. Sirucek's post-hearing deposition. Defendants were instructed to renew their objection after the deposition if they wished to pursue the matter. They did not renew the objection and JE 18 and 19 were admitted in whole.

3. When Claimant returned for a recheck with Dr. Stagg on January 30, he reported his head was doing well and his left hip and thigh were improving. Claimant had developed discomfort in his neck, shoulders and throughout his spine. His left knee was also painful and felt unstable at times. Claimant was prescribed exercises for his back and shoulders, along with heat and ice for painful areas. Dr. Stagg temporarily restricted Claimant to lifting, pulling, and pushing no more than ten pounds. Claimant continued to work in a light duty capacity for Employer.

4. On his February 6, 2017, visit, Claimant indicated his head, hip, knee, thigh and ankle were doing better but his mid and low back were still tender, and he would occasionally get a "shock-like" pain in his mid back. Dr. Stagg prescribed physical therapy for his entire spine after diagnosing a worsening mid and low back strain. Work restrictions continued.

5. Claimant's complaints on his February 13 visit centered on mid and low back pain without radiculopathy in his arms or legs. X-rays showed no acute abnormalities, although some degenerative changes were noted at T11, 12, and L1. Dr. Stagg recommended increased home exercise, including stretching and a walking program.

6. At his February 21 visit with Dr. Stagg, Claimant continued to complain of pain in his mid and low back without radiculopathy. The doctor was skeptical that Claimant's thoracic spine was injured but ordered an MRI to look for a disc herniation.

7. On the February 28 visit, Dr. Stagg noted Claimant had "a little radicular type pain radiating to the left lateral thorax" and some tenderness and hypesthesia in his left mid back at the area of T8-10. JE 2, p. 16. Dr. Stagg noted Claimant had no radiculopathy into his lower extremities.

8. An MRI of Claimant's thoracic spine taken on March 27, 2017 showed a left paracentral disc protrusion narrowing the left foramen and lateral recess with mild canal narrowing at T10-11.[4]

9. At Claimant's March 29 appointment, Dr. Stagg noted Claimant was "slowly improving" but still had pain in his lower thoracic spine and occasionally Claimant would get "a few paresthesias" into his left leg. Dr. Stagg also noted "a little hypesthesia" in Claimant's left lower thoracic spine. JE 2, p. 18. Claimant's lower extremity motor and sensory function and deep tendon reflexes were normal bilaterally.

10. After reviewing the MRI and consulting with colleagues, Dr. Stagg obtained approval for a selective nerve block and selected David Jensen, D.O. to treat Claimant.

11. Dr. Jensen first saw Claimant on April 25, 2017. At that time Dr. Jensen noted Claimant's complaints as burning in his shoulders, as well as left sided lower thoracic region pain and burning which increased with prolonged standing, forward bending, twisting, and lifting, and was relieved somewhat by stretching. Dr. Jensen further noted Claimant's pain did not radiate down into his legs. Claimant felt his limited physical therapy treatments had increased his symptoms and were not beneficial, so Claimant discontinued them.

12. During his physical examination, Dr. Jensen found Claimant was tender in the lower thoracic region, but otherwise had no abnormal findings or complaints anywhere from Claimant's head to feet. Dr. Jensen reviewed Claimant's previous thoracic MRI and noted the left

[4] At some places in the record, the affected area of Claimant's thoracic spine is labeled T10-11, and at other places it is labeled T11-12. This apparent discrepancy is due to a counting preference (up the spine or down the spine) of the different physicians. Claimant has but one level of herniation in his thoracic spine, regardless of the differing labels used to identify the location.

sided disc herniation with slight indentation of the anterior cord without evidence of cord compression. Dr. Jensen diagnosed a thoracic myofascial strain.

13. Dr. Jensen suggested treatment options to Claimant; more physical therapy and conservative care, anti-inflammatory medications/muscle relaxers, or a trial of injections. The last option would be a surgical consult. Claimant elected the injections.

14. The injection only provided a subjective 20% improvement in Claimant's symptoms. At Claimant's June 2, 2017 visit with Dr. Jensen, Claimant listed his complaints as including neck and bilateral shoulder pain, as well as a feeling like his legs were falling asleep. On examination, Claimant complained of mild pain during straight leg raises.[5] Dr. Jensen noted these complaints were not likely to originate from Claimant's thoracic spine, so he ordered a cervical and lumbar MRI to augment Claimant's previous thoracic MRI.

15. Claimant's cervical MRI showed no abnormalities. Claimant's lumbar MRI was read by Dr. Jensen as showing "some foraminal narrowing and possible impingement on bilateral L5 nerve roots as they are exiting out of the foramen."[6] At his June 22 visit, Dr. Jensen told Claimant he had no surgical condition but should undertake more sustained physical therapy to attempt to improve his diagnosed "chronic spine pain, predominately thoracic, upper shoulder pain and intermittent lumbar radicular symptoms." JE 3, p. 35.

16. Claimant did not persevere with physical therapy; instead he attended approximately four visits before stopping. Claimant indicated to Dr. Jensen the physical therapy

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[5] Office notes from this visit were the only ones in 2017 to list positive straight leg raises by Dr. Jensen. When Dr. Verst saw Claimant later in 2017, as discussed below, he also noted negative straight leg raises.

[6] The same MRI was read by the attending radiologist as "mild degenerative changes at L5-S1 [which] result in minimal impingement on the exiting L5 nerve roots bilaterally." JE 7, p. 107. The radiologist also indicated this finding could account for bilateral lower extremity radicular symptoms if present and clinically correlated.

was painful and requested pain medication from the doctor at his July 20 visit. Dr. Jensen prescribed a muscle relaxer, an anti-depressant (for use at bedtime), and a pain medication as needed. He also prescribed continued physical therapy. On that visit, Dr. Jensen diagnosed Claimant's condition as "chronic lower back pain, hip and leg pain, midback pain, herniated disc." JE 3, p. 37.

17. In his August 3, 2017, office notes, Dr. Jensen indicated Claimant had made no progress in physical therapy, and still complained of pain in his lower thoracic region which was not improving despite the doctor's hope that physical therapy would have resolved those complaints. Dr. Jensen felt that although there really nothing warranting surgery, perhaps Claimant should see a spinal surgeon for further suggestions.

18. Claimant saw orthopedic surgeon David Verst on August 9, 2017. Oddly, Dr. Verst's records indicate Claimant's chief complaints as low back pain, mild left lower extremity pain, and occasional leg numbness. It may be that Dr. Verst was describing Claimant's lower thoracic spine area as "low back," because the doctor's assessment after a physical exam was "thoracic degenerative disc disease, thoracic facet syndrome, and thoracic herniated nucleus pulposus." JE 4, p. 48. Dr. Verst recommended a second nerve root block injection at T11-12, continued physical therapy, and continued work restrictions.

19. Claimant returned to Dr. Jensen on August 23, 2017, still complaining of lower thoracic back pain. Dr. Jensen planned for a second thoracic spine injection.

20. Claimant saw Dr. Verst again on September 7, 2017, at which time the doctor again recommended Claimant undergo a second T11-12 left epidural injection. Dr. Verst noted that such procedure would require prior authorization from Surety.

21. Rather than sign off on a second epidural injection, Surety hired Tom Faciszewski, M.D., an orthopedic surgeon, to conduct an independent medical examination (IME) on Claimant on October 3, 2017.

22. Dr. Faciszewski reviewed medical records and diagnostic films, conducted an examination of Claimant, including his history, and rendered opinions as set out below.

23. In his October 3, 2017 report, Dr. Faciszewski found that Claimant had preexisting degenerative disc changes at T11 through L2, with a T11-12 disc herniation related to his industrial accident in question which displaced but did not compress the thoracic spinal cord. Claimant also had hyperreflexia in his left lower extremity of questionable relationship to the industrial accident. Dr. Faciszewski opined that Claimant's thoracic disc herniation could be chronic and may or may not heal over about a two-year time frame. In any event, he felt further epidural steroid injections were unwarranted because of Claimant's history of unsuccessful prior injections. He further opined that Claimant needed no further medical treatment related to his industrial accident, but Claimant should continue self-directed home exercises taught to him in therapy.[7]

24. After receiving this report from Dr. Faciszewski, Surety denied authority for further epidural steroid injections, and no injections were performed.

25. In November 2017, Dr. Faciszewski rated Claimant's permanent impairment at 7% whole person for his disc herniation. Surety provided benefits commensurate with this impairment rating.

26. After Surety denied further medical treatment it appears from the record that Claimant sought no further medical treatment.

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[7] Dr. Faciszewski issued subsequent addenda and was deposed. Because those opinions are central to evaluation of Claimant's permanent disability, they will be discussed in greater detail in the appropriate section of these findings.

27. In April 2019, Claimant had Anthony Sirucek, D.C., a Twin Falls chiropractor, conduct an IME. Dr. Sirucek reviewed records, took a history from Claimant, and conducted an examination. He prepared a report dated April 9, 2019, wherein he opined the industrial accident in question caused Claimant's herniated T11-12 disc and permanently aggravated Claimant's preexisting degenerative arthritis in his thoracic and lumbar spine. Dr. Sirucek opined that Claimant would permanently suffer referred pain to his upper thoracic spine and lower extremities from his disc herniation. Apportionment was inapplicable because Claimant's preexisting conditions were asymptomatic prior to his work accident.

28. Dr. Sirucek eventually settled on a PPI rating of 7 to 8% whole person. He also imposed work restrictions including lifting no more than 50 pounds, and 20 pounds occasionally. He should avoid driving on rough roads and other jostling activities. Claimant should limit his bending and twisting to no more than occasional. Dr. Sirucek felt Claimant would benefit from palliative electrical stimulation treatment indefinitely into the future at the rate of two to four times a month for six months and then hopefully once a month thereafter; each treatment will cost between $100 and $150.[8]

29. Each party hired a vocational rehabilitation expert to evaluate Claimant's permanent disability. Both experts, Nancy Collins, Ph.D, and Mary Barros-Bailey, Ph.D., determined that Claimant has a 24% PPD rating inclusive of PPI if Dr. Sirucek's opinions and recommendations are followed. If Dr. Faciszewski's opinions are accepted, Claimant has no PPD over his PPI rating of 7% whole person according to Dr. Collins. Dr. Barros-Bailey did not dispute that opinion.

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[8] Dr. Sirucek was deposed and his testimony is critical to Claimant's case. His testimony will be discussed in greater detail below.

DISCUSSION AND FURTHER FINDINGS

30. The issues will be addressed in the following order for judicial economy; first a determination of Claimant's PPI rating, followed by whether Claimant sustained permanent partial disability in excess of that PPI rating, whether he is entitled to the palliative care recommended by Dr. Sirucek, and finally the issue of attorney fees.

PPI Benefits

31. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and a claimant's position is considered medically stable. *Henderson v. McCain Foods*, 142 Idaho 559, 567, 130 P.3d 1097, 1105 (2006). Idaho Code § 72-424 provides that the evaluation of permanent impairment is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and other activities.

32. Dr. Faciszewski rated Claimant's permanent partial disability at 7% whole person. Dr. Sirucek eventually settled on a PPI rating of 7 or 8% whole person for Claimant. While Dr. Faciszewski subsequently opined that Claimant had no permanent impairment after reviewing repeat MRI scans, Defendants paid Claimant benefits based upon a 7% PPI rating, and did not seek a credit for such payment. Defendants are not disputing Claimant is entitled to benefits for disability based on medical factors (PPI) at the rate of 7% whole person.

33. Claimant carries the burden of proof on this issue. Claimant has provided no credible argument for a PPI rating above the 7% whole person rating provided by Dr. Faciszewski and agreed to by Dr. Sirucek as an acceptable PPI rating. In this case, the undersigned has no reason to discount or ignore the opinions of two medical experts who determined Claimant's

reasonable PPI rating at 7% whole person. The mere fact that Dr. Sirucek also felt it would also be reasonable to assign an 8% PPI rating to Claimant is of no consequence.

34. Claimant is entitled to disability benefits based on medical factors (PPI) at the rate of 7% whole person.

35. Claimant has failed to prove he is entitled to disability benefits based on medical factors (PPI) greater than those previously paid him by Defendants prior to hearing.

Permanent Partial Disability Benefits

36. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425.

37. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the

physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). The burden of establishing permanent disability is upon Claimant. *Seese v. Idaho of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986).

Dr. Sirucek

38. Dr. Sirucek was deposed on November 19, 2019. Therein, Dr. Sirucek reiterated his opinion that Claimant's thoracic spine disc herniation was directly caused by the industrial accident in question, noting that such opinion was shared by Dr. Stagg, one of Claimant's treating physicians. Dr. Sirucek opined that Claimant also suffered a chronic sprain/strain of his back in the accident with symptoms extending from Claimant's shoulders to low back and lower extremities. Finally, Dr. Sirucek opined that Claimant suffered spinal stenosis, or narrowing of the neural canal, with nerve impingement and sciatica.

39. Dr. Sirucek is of the belief that sprains and strains never return to their pre-injury status; never heal completely. As such, Claimant's back sprain/strain constituted a permanent injury, which leads to "abnormal firing of the nervous system, which causes muscles to go into contraction" and results in pain. Sirucek Depo. pp. 23, 24. Dr. Sirucek noted that Claimant exhibited muscle guarding throughout his entire spine. He testified that muscles go into spasm to prevent a person from "moving into where the pain is." *Id.* at 25, 26. In other words, muscles go into spasm to protect a person from further injury.

40. Dr. Sirucek testified that when he saw Claimant in April 2019, more than two years post-accident, Claimant still had muscle guarding causing pain. In addition to his physical examination, Dr. Sirucek utilizes a medicolegal device known as a DynaROM (using MyoVision) to document in graphic form what he contends is "objective" evidence of pain through muscle

guarding. This device utilizes a surface EMG which purports to measure microvoltage changes as a person bends forward and compares the graph of such microvoltage changes to an "ideal" graph. An "abnormal" graph is interpreted as showing pain due to muscle guarding.[9] Claimant's graph was abnormal. Dr. Sirucek also physically observed muscle guarding during his examination.

41. Dr. Sirucek also found clinical evidence of nerve involvement at Claimant's L5 level, which radiographically showed minimal impingement at that level on the June 16, 2017 MRI. For example, Dr. Sirucek found Claimant's straight leg raises were positive bilaterally, and Claimant had hypoesthesia at the L5 dermatome bilaterally. Claimant's Kemp test, designed to test for lumbar facet pain, was also positive bilaterally. (Claimant also had a positive FABER test, but Dr. Sirucek acknowledged that test was designed to show SI joint pain, not L5 nerve involvement.)

42. Dr. Sirucek testified that persons with degenerative changes, such as Claimant had in his thoracic and lumbar spine, can render the person more susceptible to injury. However, Dr. Sirucek opined that Claimant's preexisting degenerative changes in his spine did not cause or contribute to his back injuries because Claimant was asymptomatic prior to the industrial accident. On the other hand, once Claimant was injured in his work accident, his preexisting degenerative conditions were aggravated and rendered chronically symptomatic.

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[9] Despite Claimant's implied invitation to delve into the legitimacy of the DynaROM device (which bills itself as a back pain "lie detector"), as evidenced by numerous articles on surface EMG use and sales literature from the manufacturer, the device is not on trial herein, and Claimant's case does not hinge on the accuracy and validity of the interpretation of Claimant's graphs. Whether the device is a legitimate tool for demonstrating pain or not is not material to the decision herein, as the issue is whether Claimant's permanent disability, if any, is greater than his PPI rating, and if so, by what degree. (As noted by Dr. Faciszewski, there are no studies scientifically correlating DynaROM findings with work capacity.) A determination of PPD can be made without an elaborate discussion of the DynaROM, which left the undersigned with as many questions as answers. Time will tell if this device is a useful tool for demonstrating chronic pain or if it will fall on the scrapheap of medically-rejected devices (such as thermography) purportedly designed to "objectively" demonstrate pain.

43. Dr. Sirucek's opinion that Claimant's lumbar sciatica was causally related to the industrial accident in question is based on the mechanism of injury – compression hyperflexion – and the fact Claimant had no similar symptoms before the accident. The same logic applied to Dr. Sirucek's opinions on Claimant's sprain/strain of the muscles and tendons of Claimant's mid and low back.

44. All of the conditions diagnosed by Dr. Sirucek (disc herniation, mid and low back sprain/strain, and lumbar sciatica due to nerve impingement) are in his opinion permanent.

45. Dr. Sirucek's restrictions on driving, jostling, and vibrations was based on the doctor's examination. Using a tuning fork, Dr. Sirucek found that Claimant was extremely sensitive to vibrations at the T12 level. From that, Dr. Sirucek deduced that jostling and vibrations would be very uncomfortable for Claimant. The tuning fork test also produced a mild reaction at L5. Dr. Sirucek also felt it would be painful for Claimant to bend, twist, and reach all day long in an employment setting. Lifting restrictions of 50 pounds/20 pounds occasionally were imposed by the doctor because it would be painful and "may cause a further acceleration of degeneration of his back." Sirucek Depo. p. 76. When pressed, Dr. Sirucek testified that exceeding his restrictions would be very difficult for Claimant to do for long hours due primarily to increased pain.

46. On the issue of pain management, Dr. Sirucek testified Claimant would benefit from continued palliative treatment for at least two to three years, and perhaps indefinitely, at a rate of three times per month, for electrical stimulation and stretching with light weights.

47. Asked to comment on Dr. Faciszewski's opinion that Claimant's thoracic herniation predated his industrial accident, Dr. Sirucek testified that Claimant had a radial annular tear which is typically the result of trauma, making Dr. Faciszewski's opinion improbable.

While Dr. Sirucek agreed that some annular tears can preexist nuclear degeneration, as opined by Dr. Faciszewski, those annular tears associated with aging do not start from the nucleus and progress outward. Claimant's tear was of a type likely caused by trauma and the only trauma noted in the medical records was the industrial accident in question. It follows that on a more-probable-than-not basis Claimant's thoracic disc herniation was directly caused by the trauma of his work accident.

48. Dr. Sirucek spent some time responding to Dr. Faciszewski's opinion that Claimant's lower extremity pain complaints, which Dr. Faciszewski characterized as "stocking glove" distribution not associated with a specific L5 dermatome, excluded any consideration that Claimant's L5 nerve impingement was causing radiculopathy into his lower extremities. Dr. Sirucek offered several responses, including variance among people and how they describe or focus on their tingling which may not correlate exactly with a specific dermatome even when one is involved, and the fact that Claimant's lower extremity pain and sensations may not be exclusively radicular, but rather also contain referred pain from muscles, ligaments, and tendons in his back. However, Dr. Sirucek felt Claimant did show lower extremity symptoms consistent with injury to the L5 nerve.

49. In cross examination, Dr. Sirucek clarified that Claimant's lumbar spinal stenosis was not caused by the industrial accident, but rather aggravated by it. He also testified that the palliative care he was suggesting could not be properly done by a therapist, but rather it should be undertaken by one who is trained in spine care "at a higher degree than a physical therapist." Sirucek Depo. p. 130. Dr. Sirucek went on to point out that therapists are not trained in medical diseases, are not able to read MRIs, and CT scans, and have a limited license compared to a chiropractor.

Dr. Faciszewski

50. In addition to his report of October 3, 2017 and calculation of PPI a month later, Dr. Faciszewski also authored reports dated March 26, May 31, and August 14, 2019. The last report responded to, and rebutted points made in Dr. Sirucek's report of May 24, 2019. Dr. Faciszewski was also deposed on December 23, 2019.

51. Dr. Faciszewski's March 26 and May 31reports centered on whether Claimant needed surgery for his thoracic spine and whether ongoing work restrictions were indicated. After a repeat MRI which showed no spinal cord abnormality and no interval change in Claimant's thoracic spine from the MRI taken in 2017, Dr. Faciszewski opined that Claimant had no need for surgery or any work restrictions. The August report is a point-by-point rebuttal of opinions held by Dr. Sirucek and are covered his Dr. Faciszewski's deposition testimony summary below.

52. In his deposition, Dr. Faciszewski testified that Claimant's complaints of numbness and tingling in his lower extremities was in a non-anatomic (not following a specific nerve root) pattern and thus not likely attributable to a spinal cord injury at a specific level. Rather, Claimant's complaints were of a pattern more often seen with metabolic or inflammatory causes.

53. Dr. Faciszewski also testified that Claimant's thoracic spinal herniation was degenerative in nature. Furthermore, while the herniation was narrowing the neural foramen on the left at T11-12, it was not compressing any nerve.

54. In defending his opinion that Claimant needed no further medical treatment, Dr. Faciszewski pointed to the fact that Claimant had no specific radicular findings or acute conditions which could be correlated to his disc abnormalities. Dr. Faciszewski felt time would heal Claimant's condition if it truly was an acute injury and not a degenerative condition.

55. Dr. Faciszewski disputed Dr. Sirucek's opinion that Claimant's thoracic disc herniation was acute by noting that Claimant had multiple levels of thoracolumbar degeneration, a common condition in many individuals, and the MRIs showed no acute changes. He also disagreed with Dr. Sirucek's recommendation for palliative care indefinitely into the future, as sprains and strains typically heal with time.

56. In cross examination Dr. Faciszewski reiterated that the MRIs showed degenerative conditions which take years to develop in Claimant's thoracic and lumbar spine, but acknowledged that such conditions were asymptomatic prior to the industrial accident in question. Furthermore, Dr. Faciszewski admitted that those asymptomatic degenerative changes were not the predominant cause of Claimant's ongoing complaints. However, he opined that there was no association between Claimant's complaints and his anatomic diagnosis.

57. Dr. Faciszewski was critical of muscle guarding as a diagnosis because it is not referable to a specific anatomic deformity or disease. At the time of his examination of Claimant Dr. Faciszewski saw no evidence of muscle guarding.

58. Dr. Faciszewski also disagreed with the notion that ligaments never fully heal and after an injury will always lack full functional ability. Instead he flatly testified "the majority of strains do get better and return to normal function." Faciszewski Depo. p. 75. He also testified that injured ligaments also can return to their original capacity.

59. Dr. Faciszewski ruled out Claimant as having a permanent sprain/strain in his lumbar and thoracic regions. He did so by examining the MRIs which showed no form of edema, ligament injury, or acute changes.

60. Dr. Faciszewski also testified that adaptive muscle shortening is not a permanent condition and can be reversed with stretching and muscle strengthening exercises. Left untreated it can become permanent.

61. After reviewing research on the DynaROM, Dr. Faciszewski was unconvinced that it was an effective diagnostic tool. He noted that he had never heard of the device in over thirty years of clinical practice. Dr. Faciszewski testified that the movements graphed by the DynaROM can be voluntarily controlled by the patient; it is known in the medical field as inappropriate guarding.

62. Dr. Faciszewski disagreed with the notion that radial annular tears are due to trauma, or that Claimant's radial tear was proof that his thoracic disc herniation was caused by trauma.

63. While initially Dr. Faciszewski gave Claimant a 7% whole person impairment rating based on information available to him at the time, at his deposition he admitted that after seeing the 2019 MRI he is of the opinion that Claimant suffered no permanent injuries in the industrial accident and in hindsight and after review of this film he would not attribute any permanent impairment to the accident in question.

PPD Analysis

64. Claimant presented as a credible witness at hearing. His testimony about his ongoing limitations and pain issues was largely consistent with the medical records.

65. After his industrial accident, Claimant continued to work for Employer in a light duty role for some time, although he was terminated from this employment later in 2017. Thereafter, he began working for Alsco in early 2018 as a route relief driver and supply person at the rate of $20 per hour plus health insurance benefits. Claimant continued to work for Alsco until

just before the September 12, 2019 hearing, at which time his position was supposedly eliminated.[10] Until his termination, Claimant had no difficulty performing his duties for Alsco, which included delivering supplies and general cleaning and upkeep at the shop. At the time of hearing Claimant was actively looking for employment.

66. Claimant testified that many of his hobbies and day-to-day activities had been curtailed since the accident due to ongoing pain complaints. He continued to have daily pain up to the hearing date which he felt would limit his work opportunities. For example, he testified he would not be able to do his pre-accident job with Employer because there was too much heavy lifting.

67. Claimant did not finish high school and has no GED. His employment history has focused on manual labor, although he has developed a skill set through his various jobs. Claimant was 33 years old at the time of hearing.

68. As noted previously, both vocational rehabilitation experts retained in this matter reached the identical conclusion on Claimant's permanent disability rating under Dr. Sirucek's work restrictions. While such opinions are advisory, there is no reason in this case to discount both expert's analysis when there is agreement among them. As such, and as argued by the parties in briefing, the question is whether or not Claimant suffered an additional 17% permanent disability over his 7% medical disability (PPI) rating previously paid by Defendants.[11]

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[10] Claimant implied at hearing that his termination was associated with the fact Alsco found out he was involved in a worker's compensation proceeding.

[11] The parties express the formula as 24% PPD inclusive of 7% PPI, which is equivalent to 17% additional impairment over, or exclusive of, PPI. To the extent Claimant argues he is entitled to PPD benefits above the 7% medical disability previously paid unless the Commission determines Claimant "suffered *no* acute injuries and is *unaffected* functionally" by the accident in question, (Cl. Brief, p. 17, emphasis added), such argument is inaccurate. The analysis focuses on whether Claimant's permanent disability, as defined by statute, *exceeds* 7% whole person. Claimant can have acute injuries and be functionally affected and still not prove his permanent disability is greater than 7% whole person.

69. It is uncontested herein that Claimant was involved in a traumatic accident at work which required immediate care and produced immediate symptoms in his back and lower extremities. (Claimant's thoracic complaints have been consistently present, while his lumbar spine complaints are much more variable.) Claimant's subjective complaints are to some extent correlated to objective radiographic studies. While Claimant had preexisting degenerative changes in his thoracic and lumbar spine, there is no evidence those conditions caused Claimant any complaints until after the accident. Furthermore, the MRI documented a disc herniation which displaced but did not compress the nerve at T11, and which corresponded with Claimant's ongoing complaints. Claimant's lumbar MRI showed mild degenerative changes which impinged minimally on the nerve roots bilaterally and could account for bilateral lower extremity symptoms. While there is dispute as to whether Claimant's lower extremity complaints can be correlated with the nerve root impingement, it is not disputed that Claimant complained of lower extremity nerve issues on a periodic basis from the time of the accident forward.

70. Dr. Faciszewski's opinions focus on strict clinical observations. He finds it significant that Claimant's thoracic disc herniation does not compress the nerve although it does displace it. Dr. Faciszewski opined that without compression there can be no corresponding complaints related to this condition. With regard to Claimant's lumbar spine, Dr. Faciszewski noted that when he saw Claimant his lower extremity complaints did not correlate with an L5 nerve root distribution and therefore Claimant's lower extremities complaints were "non-anatomic" and could not be correlated with the MRI findings. Dr. Faciszewski felt Claimant's spinal herniations, if traumatically caused, should have resolved within two years, which did not happen.

71. Dr. Faciszewski's opinions discount human variables. The distinction between displacing the nerve root and compressing the nerve root might be the distinction between

an operable and non-operable condition, but there was no testimony that a herniation which displaces but does not compress a nerve can never be a source of pain.

72. While the industrial accident may or may not have caused the herniation at T11 there is no disputing the fact that Claimant has an objective abnormality at that level, and ongoing pain emanating from that region, developing immediately after the accident in question.

73. Regarding Claimant's lumbar spine, there is no testimony that the industrial accident caused the stenosis at L4-5. In fact, all parties agree this was a preexisting condition. Claimant's lower extremity issues, while not as consistent as his thoracic spine complaints nevertheless began at or shortly after the industrial accident in question and continued on an intermittent basis thereafter.

74. The Commission recognizes that a previously asymptomatic condition which is permanently aggravated by an industrial accident is compensable. *See e.g. Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 879 P.2d 592 (1994). (Aggravation, exacerbation, or acceleration of a pre-existing condition caused by a compensable accident is compensable.)

75. The exact cause of Claimant's ongoing complaints are not clearly defined. To the extent Dr. Faciszewski opines that Claimant's complaints are the natural progression of a degenerative condition such opinion fails to account for the timing of the onset of symptoms. Surely it cannot be argued that Claimant's degenerative spinal condition coincidentally devolved to the point of becoming symptomatic just as he was involved in an accident at work. Dr. Faciszewski was not asked, nor did he explain, why Claimant is experiencing ongoing back complaints. Indeed, Dr. Faciszewski testified there is no diagnosis for Claimant's condition. He refused to acknowledge Claimant had soft tissue sprains/strains from the accident, and further does not believe that soft tissue injuries can become permanent, although he did concede that

adaptive muscle shortening may become permanent. His opinions leave the undersigned grasping for an explanation of Claimant's current condition.

76. On the other hand, Dr. Sirucek attributed several injuries to the accident in question. He felt the accident caused Claimant's herniated thoracic disc, permanently injured (sprain/strain) the soft tissues in Claimant's back and created a situation for permanent muscle guarding and referred pain in Claimant's back and lower extremities. Claimant's lumbar spinal stenosis was also permanently aggravated by the accident in question and led to Claimant's sciatica.

77. While the undersigned is quite skeptical of many of Dr. Sirucek's opinions which are couched in nearly-universal terms, such as the fact that radial annulus tears are almost always caused by trauma, and sprain/strains never fully heal, as well as his various DynaROM claims, it must be remembered that the universal truth of such statements is not at issue. Whether radial annular tears are 98% traumatic in origin, or .98% traumatic in origin is not an issue for decision in this case. Rather, *as applied to this Claimant*, the issue for resolution is whether Dr. Sirucek's causation opinions explain Claimant's ongoing complaints. The fact that he paints with an overly broad brush in rendering many of his opinions weakens but does not collapse his opinions in this particular case.

78. While not endorsing any of Dr. Sirucek's blanket statements as accurate (and therefore authority for future decisions) Dr. Sirucek's opinions on permanent aggravation of preexisting conditions in this case address Claimant's ongoing complaints. Claimant exhibited positive clinical signs during Dr. Sirucek's physical examination conducted more than two years after the accident in question. Claimant lacked full range of motion with flexion, and complained of intermittent tingling and numbness in his lower extremities. Claimant was tender on palpation of his thoracic spine and had other clinically positive tests.

79. Dr. Sirucek's causation opinions as they relate to Claimant are afforded more weight than those of Faciszewski. The weight of the evidence as a whole supports Dr. Sirucek's opinions on causation; Faciszewski's opinion that Claimant suffered no acute injuries in the accident in question is not endorsed by any other physician in this case, including Claimant's treaters.

80. Having determined that Claimant suffered permanent injuries to his thoracic and lumbar spine does not end the inquiry regarding his PPD rating. The issue is not whether Claimant has any work limitations from his injuries caused by the industrial accident but rather whether his work limitations are greater than the disability rating previously assigned him.

81. Dr. Faciszewski placed no limitations on Claimant, while Dr. Sirucek limited Claimant's lifting, (20 pounds occasionally, 50 pounds maximum), jostling, (driving on rough roads), bending, and twisting, (occasionally). The primary reason for the limitations was due to the fact that such activities would be painful. (Dr. Sirucek also felt such activities could place Claimant at risk for accelerated degeneration, but that was not his primary rationale, and in fact MRIs taken two years apart show no acceleration in Claimant's degenerative conditions) Dr. Sirucek also noted Claimant more likely than not could not physically perform such tasks continuously or frequently over an eight hour work day even if he wanted to.

82. Dr. Sirucek's opinions addressed restrictions and limitations. Restrictions are suggested to prevent further injury, or to maintain the health of the patient. Restrictions do not necessarily define the limits of a patient's physical capabilities but suggest how the patient should behave in order to prevent further injury. Limitations are not placed on patients by physicians; they represent the limits of a patient's physical ability to perform an act. *See Talbot v. Summit Wall Systems*, IIC 2012-004039 (November 14, 2017).

83. There is little evidence to support the theory that if Claimant exceeds the restrictions imposed by Dr. Sirucek he will have a legitimate risk of further injury. However, as Dr. Sirucek noted, if Claimant attempted to work in conditions which exceed his suggested restrictions, he would suffer increased pain to the point where it would be difficult to maintain such employment. Claimant testified convincingly at hearing that he physically could not perform work in excess of the restrictions suggested by Dr. Sirucek on a repeated basis due to the fact that it would simply be too painful. Claimant testified to numerous daily activities which he has had to curtail since the accident due to pain. While pain is not an injury, pain itself can produce functional loss and thus is a medical factor to be considered in determining permanent [disability]. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 754-55, 769 P.2d 1122, 1126-27 (1989).

84. Claimant will be precluded from those jobs, such as his time-of-injury employment, which require sustained heavy lifting, bending, and other movements which inflame his back pain. Whether such preclusion is based on physician-imposed restrictions or self-imposed limitations is not the crucial point. What is determinative is the extent to which Claimant is limited in his ability to find and sustain employment in light of his permanent injuries. In this case, the restrictions and limitations are approximately and functionally identical. Both vocational experts used the restrictions, which mirror Claimant's limitations, to calculate Claimant's lost employment opportunity (PPD) at 24% inclusive of his 7% PPI rating. The undersigned finds that the 24% PPD rating suggested by the vocational rehabilitation experts is valid.

85. When considering the totality of the evidence, Claimant has proven a permanent partial disability of 24%, inclusive of his 7% whole person permanent impairment rating from his industrial accident of January 25, 2017.

Future Medical Care

86. Claimant argues he is entitled to future palliative care to address his pain complaints. Specifically, he argues he is entitled to the specific treatment suggested by Dr. Sirucek, consisting of electrical stimulation and bending/stretching exercises. Defendants argue Claimant has no continuing injury from the industrial accident and therefore is not entitled to any treatment moving forward.

87. Claimant bears the burden of proving his entitlement to ongoing medical care. He has proven he suffered permanent injuries in the accident in question which cause him daily pain and limit his activities. Dr. Sirucek has opined that Claimant would possibly benefit from electrical stimulation and stretching with light weights for at least the next two years or more. Dr. Sirucek dismissed the idea that such care could be provided by a physical therapist, as they supposedly do not have sufficient training.

88. Complicating the issue is the fact that although several physicians have prescribed physical therapy, Claimant unilaterally discontinued the treatments when they became painful. There was no evidence the therapy was causing additional permanent harm to Claimant, but rather that he did not tolerate the increased pain which came with therapy, so he quit. Likewise, injections have proven to be ineffective.

89. While the physical therapy regimens prescribed and undertaken by Claimant to date have failed to produce benefits, it is a common thread throughout the medical records that Claimant would benefit from some form of physical therapy. It does not appear that the electrical stimulation therapy suggested by Dr. Sirucek was specifically attempted in this case.

90. Employer is obligated to provide reasonable and necessary medical care, including in some circumstances, palliative care, under Idaho Code §72 - 432. *See also, Rish v. Home Depot, Inc.*, 161 Idaho 702, 390 P.3d 428 (2017). When examining the record as a whole, Claimant has proven his entitlement to additional therapy aimed at reducing his chronic back and lower extremity pain. However, such therapy is not limited to the suggestion provided by Dr. Sirucek, and specifically his opinion that such therapy must be provided with someone with "chiropractor-or-better" credentials is specifically rejected. Trained physical therapists have electrical stimulation, light weights, and bending exercises. The exact treatment is left to the Claimant's treating physician to determine, keeping in mind what has failed to work in the past. Additionally, the right to such treatment is not unlimited, nor is it required that such treatment must be undertaken in-office. It may be that something like a TENS unit, or home exercises after adequate instruction may suffice under Idaho Code §72 - 432. Also, it is incumbent on Claimant to actively participate in the treatment. It is not reasonable to assume he may quit the treatment at his discretion, or fail to do his home exercises, as he has admittedly done in the past, and yet continue to demand additional treatment. What constitutes reasonable and necessary treatment is not at issue herein, but Claimant has proven his entitlement to additional medical treatment unless and until it proves ineffective.

91. Examining the record as a whole, Claimant has proven his entitlement to additional reasonable and necessary palliative treatment under Idaho Code §72 - 432.

Attorney Fees

92. Claimant advances a novel argument for attorney fees. Basically, he proposes that it is unreasonable for a surety to delay authorization for any and all recommended medical treatment until the surety obtains a second opinion via an IME. Under Claimant's theory,

if a treating physician recommends a medical treatment, the Surety is obligated to authorize such treatment until such time as the Surety has secured an opinion that such treatment is unwarranted. However, the surety must have the opinion in place *prior to* the treating physician suggesting the treatment if it wished to deny authority for the treatment.

93. In the present case Claimant had previously received injections into his thoracic spine which proved ineffective. Dr. Jensen suggested another round of injections. Instead of automatically approving the injections, Surety sought an independent medical examination to determine whether such injections were reasonable and necessary in spite of the fact that prior injections had proved ineffective. Claimant argues Surety violated Idaho Code §72 - 804 when it obtained the IME prior to denying authorization for the additional injections. Under Claimant's theory, Surety should have been required to approve the additional injections recommended by Dr. Jensen, and if Surety did not want to pay for even more injections, it could have then obtained an opinion that further injections (after those which it was obligated to authorize because the treating physician asked for them) were unreasonable. But, it could not "call a time out" on authorizing the injections sought by Dr. Jensen while it went out and obtained a second opinion on the reasonableness of such request.

94. Claimant admits that historically such a practice as occurred here - where the Surety seeks an IME opinion prior to granting or refusing authorization, has been an accepted practice - but argues the practice must yield to the language of the relevant statutes, namely Idaho Code §§72 - 432 and 804.

95. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's

physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter.

96. Idaho Code § 72-804 provides three instances where a defendant may incur attorney fees. First, it may unreasonably contest a claim for benefits. Second, a defendant may fail to pay benefits within a reasonable time after receipt of a written claim for compensation. Third, a defendant may discontinue compensation justly due and owing an employee without a reasonable ground.

97. Claimant points out that Surety herein had no medical basis for denying the injections proposed by Dr. Jensen until after it obtained the opinions of Dr. Faciszewski. In effect, according to Claimant, Surety discontinued Claimant's medical treatment, not on a medical basis, but by declining to pre-approve the prescribed procedure. Claimant notes that in *Chavez v. Stokes*, 158 Idaho 793, 353 P.3d 414 (2015), the Court held that it is the physician's role to determine treatment, measured at the time to physician prescribes the treatment, and not by "armchair" doctoring after the fact. So, if the treating physician orders a treatment, the Surety must pay for it unless it has in hand at the time of the order a medical basis to deny the treatment. Furthermore, Claimant argues cases such as *Sotelo v. The Pillsbury Co.*, IIC 1997-006770 (August 15, 2007), preclude Surety from manipulating the treating physician-patient relationship by interfering with the relationship once established.

98. In summary, the Claimant seeks a ruling that any and all care prescribed by the treating physician is presumed reasonable unless there is a preexisting medical opinion otherwise. In this particular case, the Commission is asked to rule that it was a wrongful delay and denial of benefits to not approve the request for injections while Surety sought out an IME opinion by a physician who was not a treater.

99. Claimant's request for attorney fees under this theory is denied. To hold otherwise would create a situation where in order to protect themselves from unreasonable medical prescriptions and procedures sureties would be forced to schedule independent medical examinations as soon as a claim is made, seeking opinions on every conceivable medical treatment which could be proposed at some point in the future by a treating physician. While our Supreme Court has noted that it is up to the physician to determine what treatment is necessary, Claimant's argument goes one giant step further; it binds sureties, and the Commission, to accept that not only is the treating physician's treatment suggestion necessary but also reasonable.

100. Without much imagination one could see the unworkable nature of such arrangement. For example, a patient presenting at a physician's office for a bruised hip could be determined to have degenerative hip disease and the doctor could prescribe a total hip replacement without any way for the surety to contest causality. Physicians could prescribe any treatment they chose, irrespective of its acceptance in the medical community, even experimental and costly treatments with dubious efficacy, and even without a reasonable nexus to the accident. *Cf. Millard v. ABCO Construction, Inc.*, IIC 2007-008413 (August 21, 2015) (*modified, Millard v. ABCO Construction, Inc.*, 161 Idaho 194, 384 P.3d 958 (2016)). There would be no way to guess in advance the myriad of potential treatments which could be proposed in any given case, and the surety would be hostage to such decisions without their ability to review the same.

101. Having the ability to timely respond to a request for treatment is a logical safeguard in this "grand bargain" scheme. Having said that, there are remedies for unreasonable conduct, such as an indefinite delay in responding to a treatment request. *See, e.g., Salinas v. Bridgeview Estates*, IIC 2011-014120 (March 4, 2016) (*rev'd by Salinas v. Bridgeview Estates*, 162 Idaho 91,

394 P.3d 793 (2017), with dissent). In the present case, there was no unreasonable delay in obtaining an opinion on the reasonableness of additional injections after the first set proved inefficacious.

102. Claimant has failed to prove his entitlement to attorney fees under Idaho Code §72 - 804.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he is entitled to disability benefits based on medical factors (PPI) greater than the 7% whole person benefits previously paid him by Defendants prior to hearing.

2. Claimant has proven a permanent partial disability of 24%, inclusive of his 7% whole person permanent impairment rating from his industrial accident of January 25, 2017.

3. Claimant has proven his entitlement to additional reasonable and necessary palliative treatment under Idaho Code §72 - 432.

4. Claimant has failed to prove his entitlement to attorney fees under Idaho Code §72 - 804.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 16th day of December, 2020.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2021, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by email transmission upon each of the following:

PATRICK BROWN
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MICHAEL MCPEEK
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Emma O. Landers

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOSHUA RYDALCH, Claimant, v. JAYCO, INC., Employer, and SENTRY CASUALTY CO., Surety, Defendants.	**IC 2017-003746** **ORDER** **Filed January 15, 2021**

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation.

Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he is entitled to disability benefits based on medical factors (PPI) greater than the 7% whole person benefits previously paid him by Defendants prior to hearing.

2. Claimant has proven a permanent partial disability of 24%, inclusive of his 7% whole person permanent impairment rating from his industrial accident of January 25, 2017.

3. Claimant has proven his entitlement to additional reasonable and necessary palliative treatment under Idaho Code §72 - 432.

4. Claimant has failed to prove his entitlement to attorney fees under Idaho Code § 72 - 804.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this the 15th day of January, 2021.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of January, 2021, a true and correct copy of the foregoing **ORDER** was served by email transmission upon each of the following:

PATRICK BROWN
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MICHAEL MCPEEK
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Emma O. Landers

jsk